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January 26, 2009

Representative Teresa Henry
Presiding Officer
Joint Health and Human Services Appropriation Subcommittee
Room 102, State Capitol
Helena, Montana 59620

Dear Representative Henry:

I am writing in response to your January 19, 2009, letter asking questions related to the Healthy Montana Kids Plan enacted by Initiative No. 155. I will answer each question in order.

Your first question asks whether the statutes enacted by the initiative apply to the entire Medicaid program or whether they created a subprogram within the broader Medicaid program. The Montana Medicaid program is codified in Title 53, chapter 6, part 1, MCA. Initiative No. 155 did not amend any of the statutes governing the Medicaid program and did not enact any new statutes as part of Title 53, chapter 6, part 1, MCA. In general, Medicaid is a federal program that helps many people who can't afford medical care to pay for some or all of their medical bills. See section 53-6-101, MCA. Section 3 of Initiative No. 155, codified as section 53-4-1103, MCA, defines an "enrollee" as a child who is enrolled or in the process of being enrolled in the plan, including children already enrolled in the programs described in 53-4-1104(2). Section 53-4-1104(2), MCA, enacted by section 4 of Initiative No. 155, provides that the Healthy Montana Kids Plan includes access to health coverage for enrollees in the Children's Health Insurance Program (CHIP) and the Montana Medicaid program. The word "child" is not defined for the purposes of Initiative No. 155. The stated purpose of Initiative No. 155 was provided in section 2 of Initiative No. 155, which is codified as section 53-4-1102, MCA. That section provides that the purpose of Initiative No. 155 is to: "(1) create the healthy Montana kids plan, which offers health coverage to uninsured children by increasing eligibility for the children's health insurance program and the Montana medicaid program and by helping families cover their children under employer-sponsored plans; (2) provide for active enrollment of children in the plan; and (3) fully utilize available federal funds to provide health coverage for children." By its own terms, Initiative No. 155 does not apply to the entire Montana Medicaid program, but only to that portion of the program for which "children" or a "child" is eligible.

Your second question is whether Initiative No. 155 eliminated consideration of assets for Medicaid eligibility for all children except those eligible in the medically needy category. Section 8 of Initiative No. 155, codified as section 53-6-1110, MCA, provides that an otherwise applicable eligibility test provided for in section 53-6-113(6), MCA, or section 53-6-131(7), MCA, does not apply to plan applicants. Section 53-6-113(6), MCA, directs the Department of Public Health and Human Services to adopt rules to govern eligibility for the Montana medicaid program. The rules may include financial standards and criteria for income and resources, treatment of resources, nonfinancial criteria, family responsibilities, residency, application,

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termination, definition of terms, confidentiality of applicant and recipient information, and cooperation with the state agency administering the child support enforcement program. The Department is prohibited from applying financial criteria below \$15,000 for resources other than income in determining the eligibility of a child under 19 years of age for poverty level-related children's Medicaid coverage groups, as provided in 42 U.S.C. 1396a(l)(1)(B) through (l)(1)(D). Section 53-6-131(7), MCA, provides that notwithstanding any other provision of Title 53, chapter 6, MCA, medical assistance must be provided to infants and pregnant women whose family income does not exceed 133% of the federal poverty threshold, as provided in 42 U.S.C. 1396a(a)(10)(A)(ii)(IX) and 42 U.S.C. 1396a(l)(2)(A)(i), and whose family resources do not exceed standards that the Department determines reasonable for purposes of the program. Section 8 of Initiative No. 155, codified as section 53-6-1110, MCA, impliedly amended sections 53-6-113(6) and 53-6-131(7), MCA, to eliminate the eligibility resource tests provided for in those sections. In addition, section 12 of Initiative No. 155 amended section 53-6-131, MCA, by enacting section 53-6-131(1)(g), MCA, which provides that a person is eligible for Medicaid if the person is under 19 years of age and lives with a family having a combined income that does not exceed 185% of the federal poverty level. The Department of Public Health and Human Services is authorized to establish lower income levels to the extent necessary to maximize federal matching funds provided for in section 4 of Initiative No. 155, codified as section 53-6-1104, MCA. Section 53-6-131(2), MCA, was also amended to add a sentence stating that any otherwise applicable eligibility resource test prescribed by the Department of Public Health and Human Services does not apply to enrollees in the Healthy Montana Kids Plan. Therefore, there is no "assets test" or "resource test" for the Healthy Montana Kids Plan.

However, section 5(2)(f) of Initiative No. 155, codified as section 53-4-1105(2)(f), MCA, provides that the Department of Public Health and Human Services is required to adopt rules that define "income" for purposes of determining eligibility for children's health coverage programs within the plan. The children's health coverage programs within the plan appear to be Medicaid, CHIP, and health insurance premium assistance as provided in section 6 of Initiative No. 155, codified as section 53-6-1108, MCA. Therefore, the "assets" that will be considered for the Healthy Kids Plan Act will be "income" as defined by rule, subject to the income level established in section 53-6-131(1)(g), MCA. In addition, section 7 of Initiative No. 155, codified as section 53-6-1109, MCA, directs the Department of Public Health and Human Services to request any necessary state plan amendments or waivers of federal requirements in order to allow the receipt of the maximum available federal funds to implement the Healthy Montana Kids Plan Act.

You have indicated that the Department of Public Health and Human Services has testified that it will transition children currently covered by CHIP to Medicaid and will pay the state's required match for Medicaid services for those children with state special revenue funds from the account established in section 53-4-1115, MCA. You have asked how "enrollment level" is defined in order to determine when the state special revenue funds in the account established in section 53-4-1115, MCA, may be used. Section 53-4-1115, MCA, was enacted by section 9 of Initiative No. 155. Section 53-4-1115(2)(a), MCA, provides that money in the state special revenue

account is to be used solely to cover the number of additional enrollees in the plan that exceeds the number of enrollees as of November 4, 2008, within the limits provided in 53-4-1004, 53-6-131, and Title 53, chapter 4, part 11, MCA, and to cover the costs of enrollment, including premium assistance, under section 53-4-1108(1), MCA, to pay administrative costs associated with expanded eligibility, and to establish and maintain a reserve. Section 53-4-1115(2)(a), MCA, provides that money in the state special revenue account may be used only to match federal funds available under CHIP and the Montana Medicaid program.

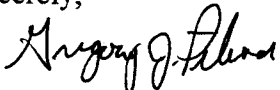
Because the Healthy Montana Kids Plan Act encompasses CHIP and Medicaid coverage for "children", the combined number of enrollees in those two programs on November 4, 2008, is the base level of enrollment and the money in the account established pursuant to section 53-4-1115, MCA, is specifically intended to be used to enroll additional children beyond that calculated number.

Your next question asks whether revenue in the health and Medicaid initiatives account established in section 53-6-1201, MCA, or tobacco settlement funds described in section 17-6-606, MCA, can be used to pay the state matching funds for children who transition from CHIP to Medicaid due to plan design eligibility modifications unrelated to changes in family income. Section 53-6-1201(3)(c), MCA, provides that money in the account may be used to provide increased Medicaid services. In a February 15, 2005, letter to Representative Kaufmann (copy attached), I concluded that by relying solely on the language contained in section 53-6-1201(3)(c), MCA, the money in the health and Medicaid initiatives account is restricted to providing additional services or to paying more for existing services. There do not appear to be any additional "services" merely by transferring children from CHIP to Medicaid.

Section 17-6-606, provides that the purpose of the section is to "dedicate a portion of the tobacco settlement proceeds to fund statewide programs for tobacco disease prevention designed to: (a) discourage children from starting use of tobacco; (b) assist adults in quitting use of tobacco; (c) provide funds for the children's health insurance program; and (d) provide funds for the comprehensive health association programs." There is nothing in section 17-6-606, MCA, that authorizes the use of money in the account for Medicaid purposes. Therefore, money in the tobacco settlement accounts may not be used for the payment of state matching funds for children who transition from CHIP to Medicaid even though the funds were appropriately used for CHIP.

I hope that I have adequately addressed your questions. If you have other questions or if I can provide additional information, please feel free to contact me.

Sincerely,



Gregory J. Petesch
Director of Legal Services
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